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In the Supreme Court of the United States

OCTOBER TERM, 1978

HOUSTON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. A-1 to A-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1979. On March 16, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 17, 1979 (Pet. App. A-6), and the petition was filed on April 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an evidentiary hearing on his allegations of factual misrepresentations in a search warrant affidavit.

2. Whether the delay between the hearing on petitioner's motion for a new trial and the decision on that motion denied petitioner his right to a speedy trial.

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of using interstate facilities to conduct an illegal gambling operation, in violation of 18 U.S.C. 1952.[1] On November 13, 1970, petitioner was sentenced to pay a $3,000 fine and to three years' imprisonment with all but the first 120 days suspended. He was placed on probation for the remainder of the term.

On November 27, 1970, petitioner moved for a judgment of acquittal and a new trial. The trial judge conducted a hearing on the motions on January 7, 1971, and denied the motion for judgment of acquittal at that time. He also denied relief on all but one of the grounds advanced to support the new trial motion and took the remaining issue under advisement (Pet. App. A-4). The trial judge died without ruling on the reserved question (*id.* at A-2). On April 28, 1978, the judge to whom the case had been reassigned denied relief on the remaining issue (*id.* at A-3).

The court of appeals affirmed petitioner's conviction and held that petitioner was not prejudiced by the delay between the hearing and determination of his motion for a new trial (Pet. App. A-1 to A-2).

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[1]Petitioner was originally indicted on 10 counts alleging violations of the Travel Act, 18 U.S.C. 1952. One count was severed, and another was dismissed on petitioner's motion at the conclusion of the government's case. The jury was unable to reach a verdict on the remaining seven counts, and a mistrial was declared as to them (II Tr. 210-213).

2. Prior to trial, petitioner moved to suppress certain evidence that was seized as the result of a warrant-authorized search of his residence. The affidavit of FBI Agent John Rodgers that accompanied the application for the search warrant stated that in January 1970 petitioner admitted to the agent that he had run a "football card" during the 1969-1970 football season and that the agent had later observed petitioner's automobile parked outside a Nashville, Tennessee, apartment house. It further stated that an informant, who had previously provided reliable information concerning violations of federal law, told the agent that petitioner was running a wagering operation within the apartment house and that petitioner made daily long distance telephone calls from various telephone booths to persons in another state in order to obtain the odds on scheduled sporting events (Pet. 8-9).

Petitioner alleged in his suppression motion that the information in the affidavit with respect to the reliability of the informant was misleading and false. In addition, petitioner contended that the information reportedly provided by the informant was incorrect and that the affidavit was so vague as to be an insufficient basis for the issuance of a warrant. In support of these claims, petitioner allegedly submitted an affidavit of Donna Holloway. The Holloway affidavit recited that she had told Agent Rodgers that petitioner was running a bookmaking operation and that petitioner was making long distance telephone calls but that she did not tell the agent that the calls were made to persons in other states because she had no way of knowing that fact (Pet. 10-11).

During a pretrial hearing, petitioner sought to introduce testimony from Holloway to demonstrate that she was not, in fact, a reliable informant, as alleged in the

search warrant affidavit (H. Tr. 9, 11-12, 15).[2] The district court ruled that petitioner could not present testimony that tended to impugn the accuracy of the facially sufficient affidavit. Petitioner was permitted, however, to question Agent Rodgers concerning his knowledge of any false statements in the affidavit and his coercion of the informant (H. Tr. 9, 12, 13). The agent testified that he did not pressure the informant in any way and that to his knowledge the statements in his affidavit were true (H. Tr. 15-16). The court then denied the motion to suppress (H. Tr. 19).

ARGUMENT

I. Relying upon *Franks* v. *Delaware*, 438 U.S. 154 (1978), petitioner contends (Pet. 15) that the trial judge improperly prevented him from eliciting testimony concerning the truthfulness of certain factual allegations in the search warrant affidavit.[3] However, petitioner failed to satisfy the prerequisites for the introduction of such evidence. The Court held in *Franks* (438 U.S. at 171):

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. *There must be allegations of deliberate falsehood or of reckless disregard for the truth, and*

[2]"H. Tr." refers to the transcript of the pretrial hearing on October 13, 1970.

[3]Petitioner's attack on the veracity of the allegations in the search warrant affidavit occurred prior to the decision in *Franks*. The Court has consistently refused to accord Fourth Amendment decisions retroactive effect. See *United States* v. *Peltier*, 422 U.S. 531, 535 (1975). There is no need to consider the retroactivity problem in this case, however, because, as we show below, petitioner's challenge to the affidavit was insufficient under *Franks* to require an evidentiary hearing.

> *those allegations must be accompanied by an offer of proof*. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any governmental informant. [Emphasis added.]

While petitioner's motion alleged that the statements regarding the reliability of the informant were misleading and false, it made no allegation of deliberate falsehood or reckless disregard for the truth. This deficiency was not cured during the pretrial hearing, when petitioner sought to examine Holloway and Agent Rodgers to establish the informant's unreliability. The additional allegation that the information given to the agent by the informant was untrue is irrelevant, because the alleged falsity must be that "of the affiant, not of any nongovernmental informant" (438 U.S. at 171).

Moreover, the Holloway affidavit does not satisfy the requirement that the request for a hearing under *Franks* be accompanied by a prima facie showing that the affiant's statements were intentionally or recklessly false.[4]

[4]The Holloway affidavit is not part of the record. Although petitioner contends that the affidavit was filed but subsequently mislaid (Pet. 9, 24), there is no indication that it was ever appended to the suppression motion or introduced during the suppression hearing. The document is not contained in the record of the district court, nor does reference to it appear in the suppression motion, the transcript of the suppression hearing, or the docket entries. Petitioner's reliance on the purported affidavit should therefore be disregarded. See Fed. R. App. P. 10(a); *Rosen* v. *Lawson Hemphill, Inc.*, 549 F. 2d 205, 206 (1st Cir. 1976).

Although the principal claim of falsity in the suppression motion was that Agent Rodgers misrepresented the informant's reliability, the Holloway affidavit does not address that matter at all. Rather, it relates to an entirely different subject—whether the informant actually told the affiant that petitioner's long distance telephone calls were made to out-of-state contacts. Furthermore, while the Holloway affidavit contains a denial that the informant told Agent Rodgers that petitioner made interstate telephone calls, it fully corroborates all the other particulars contained in the search warrant affidavit. Finally, petitioner's claim (Pet. 15) that the district court precluded him from examining Agent Rodgers as to the truthfulness of certain allegations in the affidavit is erroneous. To the contrary, the court specifically stated that "the defendant is entitled if he desires to interrogate [the agent] with reference to his knowledge of any false, allegedly false, statements in the affidavit * * *" (H. Tr. 9).

2. Citing *Barker* v. *Wingo*, 407 U.S. 514 (1972), petitioner contends (Pet. 20) that the delay between the hearing and disposition of his motion for a new trial constituted a denial of his Sixth Amendment right to a speedy trial. *Barker*, however, involved delays between arrest and trial and did not consider whether the right to a speedy trial extends to post-trial proceedings. See *Brooks* v. *United States*, 423 F. 2d 1149, 1152-1153 (8th Cir. 1970), cert. denied, 400 U.S. 872 (1971). Nor is petitioner's claim aided by cases holding that sentence must be imposed within a reasonable time after return of the verdict. See *United States* v. *Campbell*, 531 F. 2d 1333 (5th Cir. 1976); *Juarez-Casares* v. *United States*, 496 F. 2d 190 (5th Cir. 1974). Sentencing is an integral part of the criminal trial process, and Rule 32(a), Fed. R. Crim. P., expressly provides that "[s]entence shall be imposed without unreasonable delay." By contrast, a motion for a

new trial is not a part of the trial but is an optional post-trial proceeding, and the district court is not expressly required to act upon it within any particular time. See Fed. R. Crim. P. 33.

In any event, even applying the standards of *Barker* v. *Wingo*, *supra*, the delay in ruling on petitioner's motion did not deprive him of his right to a speedy trial. Although more than seven years elapsed between the hearing on the motion and its ultimate resolution, petitioner was free on bond during that period and was not required to pay the $3,000 fine or to begin service of his sentence. As he concedes, he made no request for a ruling, nor did he ever assert a right to the speedy disposition of his motion (Pet. 23). On the other hand, the delay was not occasioned by the prosecution's misconduct or lack of diligence. As the court of appeals observed (Pet. App. A-2), "[t]he prosecution did all that it could to persuade the District Judge to rule on the motion, short of filing a mandamus proceeding against him in the appellate court."

Petitioner's claim (Pet. 24) that the delay prejudiced his ability to prosecute an appeal is wholly unconvincing. The alleged loss of the original copy of the Holloway affidavit is inconsequential. As we have stated, nothing in the record suggests that it was ever introduced in evidence or brought to the district court's attention, and even assuming that it was, the allegations in the suppression motion and Holloway affidavit were insufficient to warrant a hearing under *Franks* v. *Delaware*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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